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No. 96-1197

In The

Supreme Court of the United States

October Term, 1996

GREGORY P. GOEHRING, et al.,

Petitioners,

v.

TIRSO DEL JUNCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act exempt individuals from contributing financially to government expenditures that they oppose on religious grounds?

2. Was the district court's factual finding that petitioners were not entitled to attorneys fees because their suit was not a cause of defendants' discontinuance of some challenged practices clearly erroneous?

PARTIES

Petitioners, Gregory P. Goehring, David Mueller, John P. Gisla, Jr., Nancy Harder, Glenn Nunes, and John Mullen, are former students at the University of California at Davis ("UCD").

Respondents are the Chair of the Board of Regents of the University of California, the President of the University of California, the Chancellor of UCD, and the Vice Chancellor of Student Affairs at UCD, sued in their official capacities. All of the individuals originally named as defendants in the petitioners' complaint and the Petition for Writ of Certiorari no longer hold those offices. The current holders of those offices are, respectively, Tirso del Junco, Richard C. Atkinson, Larry N. Vanderhoef, and Carolyn F. Wall. Those individuals should be substituted as defendants pursuant to Federal Rules of Civil Procedure, Rule 25(d)(1).

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SUMMARY OF ARGUMENT

Neither of the questions petitioners raise warrants this Court's review. Applying standards that petitioners concede are appropriate, the Ninth Circuit rejected petitioners' claim that they are exempt from contributing to government expenditures that they oppose on religious grounds. That decision is consistent with a long and unanimous line of cases holding that individuals do not have religious line item veto power over government spending.

Similarly, in affirming the district court's denial of petitioners' request for attorneys' fees, the Ninth Circuit applied well-settled precedent that requires petitioners to make a factual showing that their lawsuit was a causal factor in obtaining relief. Petitioners do no more than challenge the district court's factual findings, findings that were supported by overwhelming evidence. The Petition should be denied.

ARGUMENT

I. SUPREME COURT REVIEW OF THE COURT OF APPEAL'S DECISION ON PETITIONERS' FREE EXERCISE CLAIM IS UNWARRANTED

Petitioners' free exercise of religion claim is a challenge to the requirement that they, along with all other similarly situated students at the University of California at Davis, pay a registration fee, a small portion of which subsidizes the cost of student health insurance policies. Those insurance policies provide coverage for abortion

services. Petitioners' religions oppose support for abortion. Fundamentally, petitioners contend that they are legally exempt from contributing to government expenditures that they oppose on religious grounds. The Ninth Circuit's rejection of this claim was a straightforward application of statutory language and the well-established precedents of this Court. It does not warrant further review.

In affirming the district court's rejection of petitioners' claim, the Ninth Circuit correctly applied the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb.[1] The Ninth Circuit held that the University's insurance system does not impose a "substantial burden" on the free exercise of petitioners' religion. *Goehring v. Brophy*, 94 F.3d at 1299-1300. As the court concluded, the

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[1] Although the Petition frames the issue in terms of a "Free Exercise Clause claim" (*e.g.*, Pet. at p. 8), petitioners' analysis is based, not on this Court's most recent Free Exercise Clause jurisprudence, as reflected in *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872 (1990), but on the standards established in the RFRA. In *Smith*, the Court rejected application of the "compelling governmental interest" and "least restrictive means" test, set forth in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), to facially neutral laws of general applicability. The expressed congressional intent behind the RFRA was to "overrule" *Smith* by statutorily restoring the *Sherbert v. Verner* test. See 42 U.S.C. § 2000bb(b)(1). Accordingly, the Ninth Circuit looked to pre-*Smith* decisions in applying the RFRA. *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996). Other circuits have also relied on pre-*Smith* Free Exercise Clause decisions, including *United States v. Lee*, 455 U.S. 252 (1982), in interpreting the RFRA. See *e.g.*, *In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996). Petitioners do not challenge application of these pre-*Smith* decisions to their claim.

connection between mandatory student fees and support for abortion services is extremely attenuated. *Id.* at 1300. Furthermore, the Ninth Circuit correctly determined that, even if petitioners' free exercise rights were substantially burdened, the University's interest in the health and well-being of its students is compelling and that its mandatory fee system constituted the least restrictive means of advancing that interest. *Ibid.*

This case is inappropriate for review by this Court for a number of reasons. First, it does not require the resolution of any important disputed issue of law. All parties and the Ninth Circuit agreed that the "substantial burden/compelling interest/least restrictive means" test – whether drawn from the pre-*Smith* case law or from the RFRA (see footnote 1, above) – applies to petitioners' claim. Thus, at best, the error that petitioners assert "consists of . . . the [supposed] misapplication of a properly stated rule of law" and is unworthy of review by this Court. Sup. Ct. R. 10.

Second, as noted above, petitioners' claim reduces to an assertion that the RFRA (and pre-*Smith* case law) permits individuals to refuse to provide financial support for any government expenditures that they oppose on religious grounds. This Court disposed of that argument 15 years ago in *United States v. Lee*, 455 U.S. 252, *supra*. The Court rejected the claim of a member of the Old Amish Order who brought suit alleging that he should be constitutionally exempt from paying Social Security taxes for his employees because his religious beliefs prohibited him from accepting benefits from or contributing to the Social Security system. The Court noted that recognizing such an exemption would lead to governmental chaos:

> If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.

Id. at p. 260.

The Ninth Circuit merely applied the *Lee* holding to the present case: "Similarly, the fiscal vitality of the University's fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds." *Goehring*, 94 F.3d at 1301 (citing *Lee*).

"If the students at the University could refuse to pay a portion of their registration fee on religious grounds, the University's fee system would be seriously undermined. There are few, if any University funded activities to which one student or another would not object." *Id.* at 1302.[2]

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[2] Citing *Keller v. State Bar of California*, 496 U.S. 1 (1990), petitioners attempt to distinguish *Lee* on the ground that "the students do not pay these fees because they are citizens of California or citizens of Davis, but because they are students." (Pet. at 12.) First, this distinction undermines, rather than supports petitioners' claim. The fact that plaintiffs *voluntarily* subjected themselves to mandatory fees – by choosing to attend UCD – can only weaken their argument. As this Court stated in *Lee*, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own

Third, although the heading of petitioners' argument claims that the Ninth Circuit's decision "is in conflict with those of other United States Court of Appeals" (see Petition at 8), *petitioners fail to cite a single decision of another court of appeal on this issue,* conflicting or otherwise. In fact, in a unbroken line of decisions reaching back over a quarter century, the federal appellate courts have uniformly rejected the claim that religious adherents may avoid financial obligations to the state because they object to state expenditures. *See South Ridge Baptist Church v. Indus. Com'n of Ohio,* 911 F.2d 1203 (6th Cir. 1990), *cert. denied,* 498 U.S. 1047 (1991); *Bethel Baptist Church v. U.S.,* 822 F.2d 1334, 1338-40 (3d Cir. 1987), *cert. denied,* 485 U.S. 959 (1988); *Nelson v. United States,* 796 F.2d 164, 167-68 (6th Cir. 1986); *Olsen v. C.I.R.,* 709 F.2d 278, 280-82 (4th Cir. 1983); *Lull v. C.I.R.,* 602 F.2d 1166, 1168 (4th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980); *First v. C.I.R.,* 547 F.2d 45 (7th Cir. 1976); *United States v. Malinowski,* 472 F.2d 850 (3d Cir. 1973), *cert. denied,* 411 U.S.

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conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity." 455 U.S. at 261.

Second, the discussion petitioners cite from *Keller* involved an issue entirely different from the one presented here: whether the State Bar of California is a government agency able to invoke a recognized exception to the "compelled speech" doctrine of the First Amendment's Free Speech Clause. *Keller,* 496 U.S. 10-11. The Court determined that the State Bar was not a "government agency." *Ibid.* Such analysis has no application to petitioners' RFRA claim. Moreover, petitioners cannot have it both ways. If the University of California is not the "government," the RFRA does not apply to it. 42 U.S.C. § 2000bb-1(a) and § 2000bb-2(1).

970 (1973); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970). *See also Erzinger v. Regents of University of California*, 137 Cal.App.3d 389 [187 Cal.Rptr. 164], *cert. denied*, 462 U.S. 1133 (1983) (holding that plaintiff's free exercise rights were not violated by mandatory student fee, a portion of which subsidized student health services including abortion services).[3]

Finally, in Part III of their argument, petitioners suggest that the Court grant certiorari to determine RFRA's constitutionality. That issue is not raised by this case. The Ninth Circuit applied the RFRA without even considering its constitutionality. It had no need to reach this constitutional question because the University's student fees were permissible under the RFRA and therefore necessarily so under *Employment Division v. Smith*, which would apply if the RFRA were overturned.

Although petitioners do not claim that the Ninth Circuit's decision raises the issue, they suggest that the Court grant certiorari in this case because in his concurring opinion one Ninth Circuit judge expressed "serious doubts" about the constitutionality of the RFRA (while conceding that the Ninth Circuit had "at least tacitly decided that the provisions of the RFRA should be followed"). *Goehring*, 94 F.3d at 1306 (Fernandez, J., concurring). Thus, petitioners wish this Court to issue an advisory opinion on the Act's constitutionality because the "concurring opinion demonstrates the importance of

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[3] It is worth pointing out that this Court had denied certiorari on cases raising this issue at least six times.

having resolution of these issues for everyone's understanding of the rights to exercise religion." (Pet. at 20.) Even if certiorari were proper for such a purpose, it would be unnecessary in this case. The Court has already granted certiorari and recently heard argument in *Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 136 L.Ed.2d 212 (October 15, 1996, Supreme Court Case No. 95-2074), a case that squarely presents the constitutionality of the RFRA. This case does not.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW FACTUAL FINDINGS OF THE DISTRICT COURT REGARDING PETITIONERS' RIGHT TO ATTORNEY'S FEES

Resolution of petitioners' claim for attorney's fees rests entirely on the correctness of the district court's factual findings, and is therefore inappropriate for review by this Court. Sup. Ct. R. 10.[4] Petitioners had challenged the University's use of mandatory student fees to support certain student organizations under this Court's "compelled speech" cases, such as *Keller v. State Bar*, 496 U.S. 1 (1990) and *Abood v. Detroit Board of Education*, 431 U.S. 209

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[4] Thus, petitioners' proposed "question presented" – "Are civil rights plaintiffs entitled to an attorney fee award pursuant to 42 United States Code section 1988 when the government entity ceases the challenged conduct *but claims* the cessation was motivated by a similar but separate lawsuit" (emphasis added) – is disingenuous. The district court and the Ninth Circuit rejected petitioners' fee request because they *found*, as a factual matter, that petitioners' suit was not a cause of the cessation of the challenged conduct, not merely because the University "claimed" as much.

(1977). During the pendency of the suit, the University discontinued mandatory fee support for some of those organizations, and petitioners dropped their challenge to the rest, rendering the "compelled speech" claim moot. Despite the fact that the district court ultimately dismissed all of their claims, petitioners contended that they were "prevailing parties" under 42 U.S.C. § 1988 and entitled to attorney's fees. The district court disagreed, and the Ninth Circuit affirmed.

Contrary to the suggestion in the Petition, there is no conflict between the Ninth Circuit's decision and the legal standard set forth by other courts of appeals. The Ninth Circuit held that, where the defendant had ceased a challenged practice during the litigation, plaintiff, to qualify as a prevailing party, must demonstrate a "causal link" between the cessation and their lawsuit. *Goehring*, 94 F.3d at 1304. This is the same standard applied by decisions of the other circuits, including all the cases petitioners cite. *See, e.g., Metro Pittsburgh Crusade for Voters v. Pittsburgh*, 964 F.2d 244, 251 (3d Cir. 1992) (plaintiffs' action must have "constituted a material contributing factor" in obtaining relief); *Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988) (plaintiff's suit must be "a substantial factor or significant catalyst"); *Morrison v. Ayoob*, 627 F.2d 669(3d Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981) ("there must be a causal relationship between the action and the ultimate relief received"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980) (plaintiff's suit must be a "necessary and important factor"). On the other hand these decisions hold that, "no award is required if the court determines

that plaintiff's suit was completely superfluous in achieving the improvements undertaken by defendants on plaintiff's behalf." *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). The courts of appeals also agree that the existence or non-existence of a causal relationship is a factual determination for the district court which may be overturned only if clearly erroneous. *See, e.g., Heath v. Brown*, 858 F.2d at 1094.

Here, the district court made a factual finding that petitioners' suit was *not* a cause of the University's change in its student fee policy. *See Goehring v. Brophy*, 94 F.3d at 1303. Rather, the district court found (and the Ninth Circuit affirmed) that the University's alteration of its student fee policy was purely the result of the California Supreme Court's decision in *Smith v. Regents of Univ. of Cal.*, 4 Cal.4th 843, *cert. denied*, 510 U.S. 863 (1993), which was handed down during the pendency of the district court action and which held the University's fee policy unconstitutional on "compelled speech" grounds.

The district court's finding was supported by overwhelming evidence. Unchallenged, sworn testimony from University administrators involved in writing the new policy, as well as contemporaneous documents, demonstrated that the change was made entirely in response to the California Supreme Court's decision in *Smith v. Regents* and that those responsible for the policy change *were not even aware that this litigation was pending*. Indeed, *even petitioners* stipulated that the University revised its fee policy "to bring its policies in compliance with the *Smith* decision." *See Goehring*, 94 F.3d at 1304. Petitioners offered *no* evidence that their suit had any impact on the University's revision of its student fee policy. As the

Ninth Circuit concluded "it is clear that the plaintiffs did not receive any relief which was not mandated by *Smith*." *Ibid.*

Thus, the district court and Ninth Circuit attorney's fees holdings are based not on application of some discordant legal standard, but on the factual conclusion that petitioners' lawsuit had nothing to do with the change in policy that rendered their free speech claims moot. That finding is not a proper subject for review by this Court.

III. CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

DATED: February 26, 1997

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